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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 112

ZEBEDEE HARDY,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONER

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Were the opposition anyone but the Government, we would consider a reply brief supererogation. But since the Solicitor General has elected not to confess error, surgical exploration may not be amiss.

The Government continues to ignore that the *Johnson* dictum reflected uncritical assumption that an indigent defendant, unlike a solvent defendant, has the burden of proving substantiality. On critical appraisal in *Coppedge*, that fallacy was exploded. This Court held that, despite the District Court's certificate, the burden rests on the Government to prove frivolity. 369 U.S. at 447-448. It follows that to warrant denial of the right to appeal the Government must carry "the burdens of proof and persuasion" (*ibid.*) that appeal cannot possibly present a sub-

stantial question. How the Government can do this to the satisfaction of the Court of Appeals, as it must under *Ellis*, without providing that Court a complete stenographic transcript, the Government does not explain. The Government's silence about *Ellis* is as deafening as that of the opinion below. If the Court of Appeals cannot properly conclude that there is no non-frivolous ground for appeal without examining a complete transcript, how can delay in providing such a transcript to indigent's counsel be anything but invidious discrimination against indigent's appeals?

The Government would justify forcing indigent defendants to meet a charge of frivolity without the transcript available for a price to every solvent defendant on the theory that Government is not required to "equalize economic conditions." (Br. 10, 18-19.) But the Government is constitutionally required to do the best it possibly can. It must assign counsel deemed competent by a court. Courts do not exempt even the ablest and highest priced members of the criminal law bar from *forma pauperis* assignments. It is true, of course, that an indigent defendant lacks the freedom of choice available to a defendant with money, but even a solvent defendant cannot commandeer the services of any particular lawyer and equalization of freedom of selection is, as a practical matter, quite impossible. It is, however, not impossible, and it is therefore constitutionally indispensable, to make it as feasible for indigents' appointed counsel as for solvent defendants' chosen counsel, to defend a charge of frivolity by supplying a complete stenographic transcript at government expense.

The Government clutches the attributed "spirit" (Br. 10, 12, 20) of § 1915 as if it were a life preserver. But it offers no rational defense of the attribution. Thus, the

Government ignores the demonstration in *Coppedge* that the requirement of a district court certificate was not conceived with special reference to criminal appeals. 369 U.S. at 444-445. It ignores Mr. Justice Stewart's statement that:

> "The provisions governing appeals *in forma pauperis* are not to be read as diluting [the] right [to appeal] by imposing a more stringent test of merit. Rather, 28 U.S.C. § 1915, provides at most a device for advance screening of appeals which, if paid, would upon motion be dismissed before argument as frivolous." 369 U.S. at 455.

It ignores the holding of *Douglas* v. *California*, 372 U.S. at 358, that denial to indigents of the same transcript available to solvent defendants for a price does go to the merits; denial leaves the indigent the right to "a meaningless ritual, while the rich man has a meaningful appeal." And it balks at our demonstration that the section cannot be read as authorizing courts to require either indigents or their counsel to specify errors. Characterization of our analysis of § 1915 as "specious" (Br. 13, note 5), is *ipse dixit*, not argument. That the trial court cannot know, "where the errors are hidden" (*Douglas*, 372 U.S. at 358), what issues warranting review appointed counsel or the Court of Appeals will uncover upon perusal of a complete transcript (*ibid.*), is exactly why the "weight" of its certificate cannot bar perusal.

Finally, the argument (Br. pp. 20-21), that to require the Government to furnish an indigent defendant a complete stenographic transcript would place him "in a more advantageous position than that of a paying appellant" because a paying appellant might be deterred by cost considerations "from ordering a complete transcript" is ex-

actly the argument this Court explicitly rejected in *Draper v. Washington*, 372 U.S. 487, 495, note 4:

> "The State also argues that in practical effect there is no difference at all between the rights it affords indigents and nonindigents, because a moneyed defendant, motivated by a 'sense of thrift,' will choose not to appeal in exactly the same circumstances that an indigent will be denied a transcript. We reject this contention as untenable. It defies common sense to think that a moneyed defendant faced with long-term imprisonment and advised by counsel that he has substantial grounds for appeal, as petitioners were here, will choose not to appeal merely to save the cost of a transcript."

Although four members of this Court dissented in *Draper*, we do not read their opinion as resting, in any part, on the defiance of "common-sense" which assumes that moneyed defendants will elect to forego the possibility of reversal to save the expense of a transcript. Even if indigents were, *pro tanto*, placed in a better position, to defend a charge of frivolity, such preference would merely tend to balance the "disadvantages in the defense of their cases [below] inherent in their impecunious condition . . . ." *Coppedge*, 369 U.S. at 450.

Respectfully submitted,

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